D. IMPLICATIONS OF THE DECISION IN BIG MAMA RAG, INC.

1. Introduction

On September 15, 1980, in Big Mama Rag, Inc. v. U.S., 80-2 U.S.T.C. Paragraph 9674, the U.S. Court of Appeals (D.C. Circuit) held the IRC 501(c)(3) "educational" regulations unconstitutional in violation of the First Amendment to the Constitution. The court ruled that Treas. Reg. 1.501(c)(3)-1(d)(3) is so vague that it allows the Service too much administrative discretion in granting* IRC 501(c)(3) exemptions to "controversial" organizations disseminating "educational" material. The court concluded that, because the "educational" regulations permit the Service to grant or withhold exemption based on an organization's views, Reg. 1.501(c)(3)-1(d)(3) unconstitutionally conditions IRC 501(c)(3) exemption on an organization's waiver of its First Amendment right to free speech.

2. The Organization

Big Mama Rag, Inc. (BMR) is a feminist organization incorporated in 1972 for the purposes of promoting women's rights and educating the public on issues of concern to the women's movement. BMR has styled itself a "radical feminist" organization. It conducts lectures, panel discussions, seminars and other educational activities on women's issues at schools, clubs, women's conferences, etc. It also operates a free library. These activities constitute a considerable minority of the organization's activities. The remainder, or most, of BMR's activities is publishing a feminist newspaper, the Big Mama Rag. It is a monthly publication containing "news" items of interest to women's rights advocates, e.g., articles on abortion, ERA, alimony, rape, lesbianism, child custody, court cases and legislation affecting women. The paper also contains interviews, editorials, poetry, and a feminist information-service exchange. Advertising is limited to feminist products or services and constitutes less than 20 percent of the newspaper's content. The paper's staff is largely volunteer, and most of BMR's

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* Although the Service usually speaks of recognizing the exemption granted by statute to an organization, the court views the Service as the granting agency. Most of the Big Mama Rag decision is based on the court's view that the Service is granting a right, rather than a privilege, to an exempt organization. As discussed later, we are reluctant to agree with the court's view.

support comes from contributions. Big Mama Rag has an editorial policy of printing anything that will advance the cause of the women's movement and refusing to publish material it considers damaging to the cause.

BMR conducts its lectures, discussions, seminars, etc., on a nonprofit basis. It also distributes two-thirds of its newspapers free. BMR has disavowed political action and substantial amounts of legislative action. Its Articles of Incorporation limit its purposes to those listed in IRC 501(c)(3) and prohibit it from engaging in activities that would violate any restrictions in that section.

3. Administrative History

BMR applied for exemption under IRC 501(c)(3) in 1974. Its application and supporting documents claimed that it was charitable because it promoted equal rights for women and that it was educational because it educated the public on subjects (women's issues) useful to the individual and beneficial to the community.

On October 17, 1974, the District Director denied BMR's application on the grounds that the organization was operated in a manner indistinguishable from a commercial newspaper and that it was not operated exclusively for an exempt IRC 501(c)(3) purpose. The District Director's finding was based on the educational regulations and in particular the "full and fair" exposition test of Reg. 1.501(c)(3)-1(d)(3). The relevant portion of the regulation reads as follows:

> (3) *Educational defined--(i) In general.* The term "educational," as used in section 501(c)(3), relates to--
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> (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
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> (b) The instruction of the public on subjects useful to the individual and beneficial to the community.
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> An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is

> not educational if its principal function is the mere presentation of unsupported opinion.
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> (ii) *Examples of educational organizations.* The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:
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> *Example (1).* An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.
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> *Example (2).* An organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs. Such programs may be on radio or television. (Emphasis added.)

Apparently, the District Director viewed Big Mama Rag's editorial policy as precluding a "full and fair exposition of the pertinent facts" sufficient "to permit an individual or the public to form an independent opinion or conclusion". The District Director determined the organization's material to be "the mere presentation of unsupported opinion" and therefore not educational within the contemplation of IRC 501(c)(3).

BMR protested the District Director's determination, and the case was referred to the National Office for technical advice. In its brief, BMR argued that it was in fact "educational" within the meaning of IRC 501(c)(3) and Reg. 1.501(c)(3)-1(d)(3). It stated that all the articles it published (though chosen for their feminist orientation) did present sufficient facts "to permit an individual or the public to form an independent opinion or conclusion" on the merits. Alternatively, BMR argued that it was a charitable organization within the meaning of Reg. 1.501(c)(3)-1(d)(2), because it eliminated prejudice and discrimination by promoting women's rights. BMR contended that once it met the charitable regulations it should qualify for IRC 501(c)(3) exemption, regardless of

whether it met the educational regulations.* After a conference the National Office issued technical advice agreeing with the District Director's determination. Consequently, on June 24, 1977, the District Director issued his final adverse determination letter to BMR. The letter stated, among other grounds, the following reason for denial of exemption:

> The organization in publishing the newspaper is not operated exclusively for educational purposes as required by Code section 501(c)(3) as the content of the publication is not educational, the preparation of the material does not follow methods educational in nature, the distribution of the material is not valuable in achieving an educational purpose and/or the manner in which the distribution is accomplished is not distinguishable from ordinary commercial publishing practices.

4. District Court Decision

Under IRC 7428, BMR sought a declaratory judgment from the United States District Court (District of Columbia) that it qualified for IRC 501(c)(3) exempt status and IRC 170(c)(2) deductibility of contributions. 79-1 USTC Paragraph 9362. The facts in the case (as set out earlier in this paper) were agreed and stipulated, and both BMR and the government moved for summary judgment on the merits.

The District Court addressed the commerciality issue first. It cited the nonprofit, volunteer structure of the newspaper and the fact that it distributed most of its papers free. The court was persuaded that the Big Mama Rag did operate in a manner distinguishable from commercial newspapers, and it found in favor of BMR on the commerciality issue.

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* Here, BMR raised the crucial issue that reached the U.S. Court of Appeals. BMR argued that the educational regulations under IRC 501(c)(3) should not be harsher than the charitable regulations. BMR asserted that, if the educational regulations could be used by the Service to impose a higher standard on organizations presenting their views to the public, the educational regulations unconstitutionally penalized such organizations by withholding IRC 501(c)(3) exemption because of their views. BMR argued that this violated the First Amendment right to free speech.

The court then addressed the main issue, i.e., whether BMR and its newspaper are "educational". The issue turned on the "full and fair" exposition standard of Reg. 1.501(c)(3)-1(d)(3)(i)(b). The government argued that BMR could not meet the "full and fair" standard because its editorial policy amounts to censorship. The policy was presented in many issues of the newspaper, but was quoted by the court (79-1 USTC Paragraph 9362) from a September 1976 issue:

> We retain the right to censor all copy (including advertisements) submitted to the paper. As feminists in the process of developing a political analysis, we must adopt certain values and reject others. By "censorship" we mean that we will not print any material which, by our judgment, does not affirm our struggle. We will not act to prevent the dissemination of such material via means other than Big Mama Rag.

The government further contended that, in addition to the policy of censorship, BMR publishes many articles which present unsupported opinion, innuendo, and use inflammatory and disparaging language. The government categorized many articles as blatant attacks on persons, organizations, and institutions that did not agree with BMR.*

BMR responded to the government's argument by stating that the BMR articles the government cited were "unrepresentative of BMR as a whole". Moreover, BMR contended that it met the educational regulations, even if the articles cited by the government were representative. BMR argued that Reg. 1.501(c)(3)-1(d)(3)(i) does not require the presentation of all points of view, and cited IRC 501(c)(3) "charitable" organizations and "religious" organizations that did not have to "make the case" for the opposing point of view. A few examples of exempt organizations performing their exempt function through relatively one-sided methods are: organizations investigating and combatting racial or sexual discrimination, Rev. Rul. 68-438, 1968-2 C.B. 209, and Rev. Rul. 72-228, 1972-1 C.B. 148; an organization publishing a newspaper primarily devoted to news,

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* The government also cited the fact that BMR's rhetoric espoused "revolution", as opposed to reform. The government argued that revolution is not a subject useful to the community within the meaning of Reg. 1.501(c)(3)-1(d)(3)(i)(b). The court would not accept such a limited definition of "useful".

articles, and editorials relating to church and religious matters, Rev. Rul. 68-306, 1968-1 C.B. 257; and, very recently, an otherwise qualifying organization that was formed to protect and restore environmental quality and whose principal activity consists of instituting litigation as a party plaintiff to enforce environmental legislation, Rev. Rul. 80-278, 1980-42 I.R.B. 8. In support of its position on the educational regulations, BMR cited section 1.501(c)(3)-1(d)(2) of the "charitable" regulations:

> The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its view does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an 'action' organization...

BMR, in essence, was pointing out a seeming inconsistency in the IRC 501(c)(3) exemption area: Although IRC 501(c)(3) corresponds generally to the common law of charity, different subsets of IRC 501(c)(3) are judged on different standards. Specifically, "educational" organizations (like BMR) presenting their views to the public are held to a stricter ("full and fair") standard than "religious", "charitable", or other non-educational IRC 501(c)(3) organizations. BMR submitted that such a result is inconsistent not only with the charitable Reg. 1.501(c)(3)-1(d)(2) but also the general intent of IRC 501(c)(3). More importantly, BMR argued, the result penalizes an IRC 501(c)(3) applicant for speaking its mind, i.e., exercising its First Amendment right to free speech.

The District Court rejected BMR's analysis and argument that it met the educational regulation. The court agreed with the government that under the IRC 501(c)(3) statutory scheme "charitable" organizations are distinguishable from "... educational organizations, which are governed by the more stringent 'full and fair exposition' standard of Treas. Reg. 1.501(c)(3)-1(d)(3)(i)". (Emphasis added.) The court also cited instances, like Rev. Rul. 68-306, 1968-1 C.B. 257, where a religious newspaper was not held to the standard of the educational regulations. The court concluded that the "full and fair" standard was applicable to an organization once it adopts an "educational" stance or applies as an educational organization. The court found that BMR simply failed to meet the "full and fair" standard:

> Plaintiff may not rely, then, on the less stringent standard for charitable organizations in seeking tax exemption on the ground primarily that it is educational. Consequently, it must meet the demands of the "full and fair exposition" standard.
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> The Court concludes that BMR does not meet the requirements of this standard, and, thus, that it is not an educational organization within the meaning of Treas. Reg. Section 1.501(c)(3)-1(d)(3). While the Court does not find it objectionable that the publication is outside the mainstream of political thought in this country, the organization has chosen to present its views as an advocate and has eschewed a policy of presenting a "full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." Treas. Reg. Section 501(c)(3)-1(d)(3)(i)(b). This is not to say that a publication may not advocate a particular point of view and still be educational, or that it must necessarily present views inimical to its philosophy, only that in doing so it must be sufficiently dispassionate as to provide its readers with the factual basis from which they may draw independent conclusions. See Rev. Rul. 68-263, 1968-1 C.B. 256. BMR, as an examination of the copies of the paper contained in the administrative record reveals, has adopted a stance so doctrinaire that it cannot satisfy this standard.

The District Court was also unsympathetic to BMR's claim that Reg. 1.501(c)(3)-1(d)(3)'s "full and fair" standard is offensive to the First Amendment and must be invalidated on constitutional grounds. The court rejected BMR's contention that the regulations contain the potential for abuse-- the possibility that the Service can discriminate under color of the regulations against organizations with controversial viewpoints.* The court found that the "full and fair" standard of the educational regulations is a reasonable rule adopted by Treasury to effectuate Congressional intent in exempting educational organizations. It is not

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* Throughout the litigation, BMR contended that the Service denied its exemption based on the Service perception that BMR promoted or espoused lesbianism. BMR pointed to statements in the National Office Conference Report. Although the District Court did not think this was the basis of the denial, the Court of Appeals (as we shall see) was persuaded that the Service did single out BMR for special treatment because of its views on lesbianism.

discriminatory on its face, because it applies to all organizations equally. Neither was it discriminatory in effect as applied to BMR, the court concluded. The court stated:

> This standard is certainly capable of objective application - it does not ask the IRS to determine whether or not the views expressed are worthy or correct. Instead, it asks only whether the facts underlying the conclusions are stated. And perhaps equally important, if the IRS were attempting to apply the standard discriminatorily, it would be an easy task for a court to evaluate whether or not the standard had been properly applied.

The District Court was convinced that there was no merit to BMR's claim that the Service discriminated against BMR on the basis of its views on lesbianism.* The court stated in footnote 7 of its opinion that the Service did not rely on the organization's sexual orientation as a basis for the denial:

> [7] Plaintiff emphasizes that it was informed by IRS officials at the Technical Advice Conference on September 7, 1976, that one of the reasons it was denied tax-exempt status was that BMR was engaged in "promoting lesbianism." Plaintiff's Memorandum in Support of its Motion for Summary Declaratory Judgment, at 19; Plaintiff's Reply Memorandum, at 26. See Rec., Exhibit D. The IRS argues that it never adopted that view, expressly disavowing any reliance on it. In support of its position it notes that the Technical Advice Memorandum directly resulting from that conference did not adopt that position. Defendant's Memorandum in Support of its Cross-Motion for Summary Judgment, at 3. On reviewing the record, the Court finds no indication that the IRS adopted such a position, despite the unfortunate comments of its officials at that meeting.

Therefore, the District Court concluded that the disputed section of the educational regulation is facially valid, was properly applied in the case, and was not used as a means to discriminate against organizations that the Service knows or suspects to be homosexual in outlook. The court decided that BMR was not entitled to IRC 501(c)(3) exemption or IRC 170(c)(2) deductibility.

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* The court pointed to Rev. Rul. 78-305, 1978-2 C.B. 172, that exempted an organization educating the public about homosexuality. The court noted that the "full and fair" test was applied to that organization.

5. Court of Appeals Decision

BMR appealed the District Court decision to the U.S. Court of Appeals (D.C. Circuit). That court reversed the District Court on September 15, 1980, 80-2 U.S.T.C. Paragraph 9674. The case was remanded to the District Court for action consistent with the Court of Appeals decision.

On appeal, BMR reiterated all the arguments it raised in the lower court. Namely, BMR claimed that it is in fact educational under the existing "educational" regulations (1.501(c)(3)-1(d)(3)); it claimed that the "educational" regulations were not intended and should not be interpreted to be harsher than the general "charitable" regulations (1.501(c)(3)-1(d)(2)); and, that if the educational regulations are used by the Service to impose a higher standard on educational organizations, those regulations improperly discriminate among IRC 501(c)(3) applicants and are unconstitutional. However, BMR refined its constitutional arguments and directed the appellate court's attention to them.

BMR restated its contention that the regulatory scheme allowed the Service to apply a harsher standard ("full and fair" exposition test of Reg. 1.501(c)(3)-1(d)(3)) than the general charitable standard to "educational" applicants for IRC 501(c)(3) exemption. BMR argued that the Service applied the harsher standard selectively to organizations whose views it considered "controversial".* BMR submitted to the Court of Appeals that such a regulatory scheme (1) violates the

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* On page 12 of its opinion, the Court of Appeals accepted this proposition as true. The court cited the EO Handbook, IRM 7751 (345).12, as evidence that the Service equates "advocates a particular position" and "controversial". That section of the Handbook is captioned "Political and Controversial Issues or Advocating a Position" and deals primarily with identifying legislative or political appeals made under guise of education. The Service has always had a policy of applying the "full and fair" standard to any organization advocating positions (controversial or not) in its "educational" material. The District Court had cited Rev. Rul. 78-305, supra, as evidence that the "full and fair" standard did not preclude exemption for organizations discussing controversial positions. Apparently, the Court of Appeals was simply more receptive to the taxpayer's claim of Service bias.

First Amendment by conditioning a government benefit* on a taxpayer's waiver of its constitutional right to advocate a "controversial" position and (2) violates the equal protection component of the Fifth Amendment by allowing the Service to bestow exemption and deductibility selectively among organizations.

The Court of Appeals agreed completely with BMR. It found "that the definition of 'educational', and in particular its 'full and fair exposition' requirement, is so vague as to violate the First Amendment and to defy our attempts to review its application in this case". Slip Opinion, pp. 7-8. (The court did not reach the Fifth Amendment due process and equal protection arguments, because it found Reg. 1.501(c)(3)-1(d)(3) unconstitutional under the First Amendment.) The court distinguished a long line of precedent holding that tax exemption and deductibility are not constitutional rights: Cammarano v. United States, 385 U.S. 498 (1959); Christian Echoes National Ministry, Inc. v. United States, 470 F. 2d 849 (10th Cir. 1972), cert. denied 414 U.S. 864 (1973); Taxation with Representation v. United States, 585 F. 2d 1219 (4th Cir. 1978), cert. denied 441 U.S. 905 (1979). The court brings tax exemption within the ambit of the First Amendment by stating on page 7 of the opinion:

> Even though tax exemptions are a matter of legislative grace, the denial of which is not usually considered to implicate constitutional values, tax law and constitutional law are not completely distinct entities. In fact, the First Amendment was partly aimed at the so-called "taxes on knowledge," which were intended to limit the circulation of newspapers and therefore the public's opportunity to acquire information about governmental affairs. See Grosjean v. American Press Co., 297 U.S. 233, 246-49 (1936). In light of their experience with such taxes, the framers realized, in the words of Mr. Justice Douglas, that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943). Thus, although First Amendment activities need not be subsidized by the state, the

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* The Court of Appeals viewed tax exemption as a grant to which constitutional protections adhere. The court distinguished a long line of cases (see text) holding tax exemptions to be legislatively granted privileges rather than constitutionally guaranteed rights. The Service will probably have a difficult time accepting this broad principle and its far-reaching implications.

> discriminatory denial of tax exemptions can impermissibly infringe free speech. Speiser v. Randall, 357 U.S. 513, 518 (1958). Similarly regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials [7] ... Cammarano v. United States, 358 U.S. 498 (1959), is not to the contrary. There the Court upheld Treasury regulations prohibiting business deductions of lobbying expenses. These "nondiscriminatory" provisions, intended to put "everyone in the community ... on the same footing," id. at 513, are very different from the regulations at issue here, which leave room for discriminatory denial of tax-exempt status.

The court held that to be constitutional a law must (1) notify those subject to the law of its meaning and (2) provide officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement. At page 9, the court stated: "These standards are especially stringent, and an even greater degree of specificity is required, where, as here, the exercise of First Amendment rights may be chilled by a law of uncertain meaning... Measured by any standard, and especially by the strict standard that must be applied when First Amendment rights are involved, the definition of 'educational' contained in Treas. Reg. 1.501(c)(3)-1(d)(3) must fall because of its excessive vagueness." The court invalidated both the general part of Reg. 1.501(c)(3)-1(d)(3)(i)(b), regarding "instruction of the public on subjects useful to the individual and beneficial to the community", and the specific "full and fair exposition" part of Reg. 1.501(c)(3)-1(d)(3)(i)(b) as unconstitutionally vague. The court concluded at page 12:

> The Treasury regulation defining "educational" is, therefore, unconstitutionally vague in that it does not clearly indicate which organizations are advocacy groups and thereby subject to the "full and fair exposition" standard. And the latitude for subjectivity afforded by the regulation has seemingly resulted in selective application of the "full and fair exposition" standard - one of the very evils that the vagueness doctrine is designed to prevent.

In addition to finding the "full and fair exposition" test vague, the court finds it subjective, i.e., dependent on the reader's (Service's) idea of what is a factual appeal to reason as distinguished from an emotional (non-factual) appeal. The court found this distinction untenably subjective, because the reader's determination of whether an appeal is factual or reasonable will be colored by the

reader's attitude to the author's point of view. In footnote 14, p. 14, the court questioned the Service's focus on "factual" presentations:

> [14] Moreover, we fail to understand the preoccupation of the district court and the IRS with facts, statistics, surveys, and such, which can be easily distorted and therefore of questionable educational value.

The Court of Appeals viewed it futile to attempt to draw lines between facts and unsupported opinion. The court thought this "subjective" approach contains the potential for abusive and uneven application. The court gave the following example on page 17 to illustrate the futility of defining educational material in terms of factual or emotional appeal:

> An example raised by appellees in their brief and discussed at oral argument is illustrative. The American Cancer Society's cause may be better served by a bumper sticker picturing a skull and crossbones and saying "Smoking rots your lungs" than by one that merely states "Smoking is hazardous to your health." Both are intended to impart the same message, and they are identical in degree of specificity of the underlying facts. Although the first may be said to appeal more to the emotions, and the second to the mind, that distinction should not obscure the similarities between the two. They should be considered equal in educational content.
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> Even if one could in fact differentiate fact from unsupported opinion, or emotional appeals from appeals to the mind, these proposed distinctions would be inadequate definitions of "educational" because material often combines elements of each.

The U.S. Court of Appeals struck down the "educational" regulations this way:

> The definition of "educational" contained in Treas. Reg. Section 1.501(c)(3)-1(d)(3) lacks sufficient specificity to pass constitutional muster. Its "full and fair exposition" standard, on the basis of which the denial of BMR, Inc.'s application for tax exemption was upheld by the court below, is vague both in describing who is subject to that test and in articulating its substantive requirements.

6. Impact

The Big Mama Rag decision will have a tremendous impact on Exempt Organizations. A cursory scan of the Exempt Organizations Master File (EOMF) indicates that some 164,000 organizations classified as exempt under IRC 501(c)(3) describe themselves as primarily engaged in educational activities. More than 350,000 exempt IRC 501(c)(3) organizations describe themselves as engaged in some degree of educational activity. Although many of these organizations are schools not trying to sway public opinion, the figures indicate how many exempt organizations seek (and usually receive) exemptions as educational organizations. The immediate problem is what standards to use in handling new "educational" organizations' applications, because the Court of Appeals does not provide guidance. The long-range problem is to develop examination guidelines and to determine whether the exemptions issued under the now invalidated regulations will be affected. At this writing, these questions are unresolved, and they will probably not be resolved easily or quickly.

One alternative solution might be to forgo any inquiry into the educational method of an IRC 501(c)(3) applicant. The rationale for this approach is that the other (non-educational) IRC 501(c)(3) requirements, e.g., no inurement, no private benefit, no politicking, no substantial legislative action, would be sufficient to guarantee presentations that the public can evaluate for itself. It is reasonable to expect the private benefit, politicking, and legislative action prohibitions to be effective bars to self-serving or partisan presentations. However, this approach renders the term "educational" in IRC 501(c)(3) largely surplus.

Aside from the number of organizations affected and the demise of specific regulations, however, Big Mama Rag has a potentially more serious impact. The Court of Appeals virtually raised IRC 501(c)(3) exemption and IRC 170(c)(2) deductibility to the level of constitutional rights with the many safeguards that attach to such rights. The court did so in spite of Cammarano, et al., supra. This judicial tack would seem to open most Service determinations on exemption and deductibility to extensive judicial review and possibly to review by other agencies concerned with constitutional and civil rights issues. This judicial position calls into question the Service's basic administrative role. One wonders if the court really understood the full implications of its ruling equating tax exemption with tax subsidies and such "subsidies" with fundamental, constitutional rights.

The Court of Appeals decision in the D.C. Circuit is especially important, because in an IRC 7428 declaratory judgment case on this issue an organization

may appeal directly to the District Court (D.C. Circuit). With Big Mama Rag as precedent in the D.C. Circuit Court of Appeals, a plaintiff could assure itself of a favorable decision on a similar issue simply by filing in the D.C. Circuit.

Although academic after the Court of Appeals decision, it is interesting to note that the court could have reached the same result without raising tax exemption to the status of a constitutional or fundamental right. The court could have found that the Service denial of exemption to BMR was an arbitrary action denying BMR of its Fifth Amendment right to due process. (It is clear that the court genuinely believed* that the Service discriminated against BMR because of its articles on lesbianism, and that that belief was a big factor in its decision. Pp. 18-19.) By finding Service action violative of the Fifth Amendment, the court would not have had to reach the validity of the statute. The Service would probably prefer such a judicial tack in future cases challenging the constitutionality of exemption determinations. However, we are now faced with invalidated regulations in the "educational" area, and we will probably have to develop new, constitutionally acceptable, standards.

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* Of course, the Service argued that denial was based only on the two grounds cited in the final denial letter--commerciality and failure to meet the "full and fair" standard of Reg. 1.501(c)(3)-1(d)(3)(i)(b).